

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

IN RE PETITION BY TREASURER OF
WAYNE COUNTY FOR FORECLOSURE

WAYNE COUNTY TREASURER,

Petitioner,

and

Supreme Court No. 129341
Court of Appeals No. 261074
Circuit Court No. 02-220192 PZ

MATTHEW TATARIAN and MICHAEL KELLY,

Intervening Parties-Appellants,

v

PERFECTING CHURCH,

Respondent-Appellee,

ALDRICH LEGAL SERVICES, PLLC
BRAD B. ALDRICH (P-57220)
Attorney for Appellants
276 S. Union, Suite 1
Plymouth, Michigan 48170
(734) 404-3000

PLUNKETT & COONEY, PC
MARY M. ROSS (P-43885)
Attorney for Wayne County Treasurer
535 Griswold, Suite 2400
Detroit, Michigan 48226
(313) 983-4801

HOWARD & HOWARD, PC
MELVIN S. McWILLIAMS (P26192)
Attorney for Appellee
222 N. Washington Ave., Ste. 500
Lansing, Michigan 48933
(517) 377-0604

BRIEF ON APPEAL-APPELLANTS

ORAL ARGUMENT REQUESTED

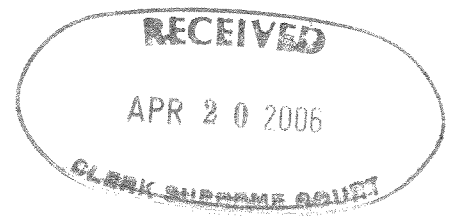


TABLE OF CONTENTS

INDEX OF AUTHORITIES	3
STATEMENT ON THE BASIS OF JURISDICTION	4
STATEMENT OF QUESTIONS PRESENTED	5
I. Whether the Trial Court retained jurisdiction to grant relief from the Judgment of Foreclosure pursuant to MCR 2.612(C), notwithstanding the provisions of MCL 211.78l(1) and (2).....	
II. Whether MCL 211.78l permits a person to be deprived of property without being afforded due process.....	
STATEMENT OF THE FACTS	6, 7
ARGUMENT	8-14
I. The Trial Court did not retain jurisdiction to grant relief from the Judgment of Foreclosure pursuant to MCR 2.612(C) due to the provisions of MCL 211.78l(1) and (2).....	
II. MCL 211.78l does not permit a person to be deprived of property without being afforded due process.....	
RELIEF REQUESTED	15

INDEX OF AUTHORITIES

Cases

<i>Omne Financial, Inc. v Shacks, Inc.</i> , 460 Mich 305, 596 NW2d 591 (1999).....	7, 8
<i>Builders Unlimited, Inc. v Oppenhuizen</i> , 2005 WL 1630517 (Mich App July 12, 2005).....	8
<i>Republic Bank v Genesee County Treasurer</i> , 471 Mich 732 (2005).....	10
<i>Daniels v Williams</i> , 474 US 327 (1986).....	10, 11
<i>Boggerty v Wilson</i> , 160 Mich App 514, 523 (1987), app. Dn. 430 Mich 851 (1988), Recon. Dn. 432 Mich 911 (1989), cert. dn. 493 US 1079 (1990).....	10
<i>Rodgers v Beckel</i> , 172 Mich 544, 548 (1912).....	11
<i>Kennedy v Hazelton</i> , 128 US 667, 671 (1888).....	11
<i>Board of Regents v Roth</i> , 408 US 564 (1972).....	11
<i>Parratt v Taylor</i> , 451 US 527, fn. 1.....	11

Statutes and Court Rules

MCL 211.78-211.78p.....	6
MCL 211.78h.....	6
MCR 211.78k.....	6, 7, 8
MCR 2.612(C)(1)(d) & (f).....	6
MCL 211.78l.....	6, 7, 8, 10, 11, 15
MCL 211.78l(1) & (2).....	7
MCL 600.605.....	7
MCL 211.78k(5)(d).....	11, 13
ACT 87 of 1980.....	11, 12
MCL 211.78.....	13

STATEMENT OF JURISDICTION

This Court entered an Order granting Appellants' Application for Leave to Appeal the July 11, 2005 Order of the Court of Appeals on February 24, 2006.

STATEMENT OF QUESTIONS INVOLVED

- I. Whether the Trial Court retained jurisdiction to grant relief from the Judgment of Foreclosure pursuant to MCR 2.612(C), notwithstanding the provisions of MCL 211.781(1) and (2)?

Trial Court: Yes.

Court of Appeals: Yes.

Appellant: No.

Appellee: Yes.

- II. Whether MCL 211.781 permits a person to be deprived of property without being afforded due process?

Trial Court: Yes.

Court of Appeals: Yes.

Appellant: No.

Appellee: Yes.

STATEMENT OF FACTS

Effective October 1, 1999, the Michigan Legislature enacted a new tax foreclosure statute in Michigan codified at MCL 211.78-MCL 211.78p. This amended tax act provides for the foreclosure and sale of properties on which delinquent taxes and assessments are due. The statute provides, in pertinent part, that not later than June 15 of each tax year, the Wayne County Treasurer shall file a single petition with the clerk of the circuit court listing all properties subject to foreclosure for failure to pay back taxes. MCL 211.78h. On June 14, 2002 the Wayne County Treasurer filed a petition for foreclosure listing several thousand properties where taxes and assessments had not been paid for the year 2000, including the property that Appellee, Perfecting Church, was listed as the record title owner of, specifically Tax Parcel I.D. #15005397. On March 10, 2003 the Wayne County Circuit Court-finding that all requirements of the foreclosure statute had been met-entered a Judgment of Foreclosure pursuant to MCL 211.78k on most of the properties contained in the Wayne County Treasurer's petition, including Appellee, Perfecting Church's, property. Perfecting Church's property was sold at auction to Appellants and a deed was issued on November 4, 2003.

Appellee, Perfecting Church, brought a Motion for Relief from Judgment of Foreclosure in the Circuit Court. Appellee based the Motion upon the premise of not receiving proper notice and cited MCR 2.612(C)(1)(d) and (f) as the legal basis. Appellee failed to follow MCL 211.78l and file a suit for monetary damages in the Court of Claims. On July 7, 2004 the Circuit Court granted Appellee's Motion and the March 10, 2003 Judgment of Foreclosure was vacated as to the subject property.

On February 23, 2005 Appellants filed a Delayed Application in the Court of Appeals asserting that by statute, Appellee, Perfecting Church, was barred from bringing the Motion for Relief from the Judgment of Foreclosure in the Circuit Court and that pursuant to MCL

211.78l(1) & (2) Appellee was required to settle this matter in the Court of Claims. On July 11, 2005 the Court of Appeals issued its Order denying Appellants' delayed application for appeal based upon a lack of merit on the grounds presented. It is from that order that Appellants have timely filed their application for leave to appeal.

ARGUMENT

- I. The Trial Court did not retain jurisdiction to grant relief from the Judgment of Foreclosure pursuant to MCR 2.612(C) due to the provisions of MCL 211.78l(1) and (2).

By constitutional and statutory construction, the Michigan circuit courts have been divested of all authority to hear cases arising under the Tax Foreclosure Act. The Michigan Constitution 1963, article 6, section 13 provides “the circuit court shall have original jurisdiction in all matters not prohibited by law...”. Michigan law additionally provides that circuit courts have been deemed to retain jurisdiction over all civil claims and controversies, “except where exclusive jurisdiction is given in the constitution or by statute to some other court...”. MCL 600.605.

The Tax Foreclosure Act specifically bars the circuit court from jurisdiction when a Judgment of Foreclosure is contested because the owner of the foreclosed property claims to have not received notice of the proceedings. Specifically, MCL 211.78l states:

“(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in the section.”

“(2) The Court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.”

The Tax Foreclosure Act is unambiguous and denies jurisdiction to the circuit court. The Michigan Supreme Court has affirmed that the judiciary is to interpret a statute based upon its plain language. In *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305, 596 NW2d 591 (1999) the Supreme Court decided that Michigan courts “may not read anything into an unambiguous

statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself, *Id* 460 Mich at 311.

The Court of Appeals, in an unpublished decision, stated “we agree with Plaintiff’s position and find that because MCL 211.78k provides that all redemption rights are excluded after 21 days of the final judgment of foreclosure, and Defendant, or his predecessors in interest, failed to file an appeal to this judgment, the trial court correctly ruled in favor of Plaintiff. While MCL 211.78k, standing alone, may leave one questioning whether absolute title vests with a governmental unit where required notice was not provided, MCL 211.78l(1) clearly and unambiguously contemplates situations where no notice was given, yet it does not result in the divestiture of fee simple title in the foreclosing governmental unit as created by section 78k, but leaves open only a claim for monetary damages. The Legislature evidently chose to keep chains of title clear and property interests unencumbered in case of notice failures, but still provide an unnoticed interest holder refuge in a monetary action for damages”, *Builders Unlimited, Inc. v Oppenhuizen*, 2005 WL 1630517 (Mich App, July 12, 2005). There is a compelling need for finality when a governmental unit takes private property for unpaid property taxes. The property needs to be placed back into productive use and the governmental unit must have a mechanism by which to do this. If an interest holder can come back, presumably at any time, and claim lack of notice purchasers at the auctions will forever be purchasing property that can be taken away at any time. This would disrupt the entire concept of real estate sales and purchases. Purchasers at auction would be remiss to spend any time, money or energy towards the property they purchase at auction. This holding will stifle development and getting property back into productive use. Purchasers would be completely reliant upon the foreclosing governmental unit’s attempts at notice without any recourse against the governmental unit. Title companies will eventually stop insuring properties acquired at auction because of the inherent risk involved. The statutes are

clear that the circuit courts do not retain jurisdiction after the 21 day redemption period has expired.

- II. MCL 211.78l does not permit a person to be deprived of property without being afforded due process

In *Republic Bank v. Genesee County Treasurer*, 471 Mich 732 (2005) the notice provisions of 1999 PA 123 (the “Act”) were upheld. Section 78l(1) of the Tax Act states “the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.” That section should also be upheld.

There is nothing in the record in this case that indicates that the Wayne County Treasurer intentionally did not provide adequate notice to the Appellee. Instead there was a negligent act committed in carrying out a process under the Tax Act. This Court has previously held that process to be valid. A negligent act committed while carrying out an otherwise valid activity does not create a due process claim. In *Daniels v. Williams*, 474 U.S. 327 (1986) the United States held that “...the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss or injury to life, liberty or property,” at 328.

Daniels has been accepted in Michigan, see for example *Boggerty v. Wilson*, 160 Mich. App. 514, 523 (1987), app. dn. 430 Mich 851 (1988), recon. dn. 432 Mich. 911 (1989), cert. dn. 493 U.S. 1079 (1990). In that case the court stated that “A plaintiff may establish municipal liability for deprivations of a federal constitutionally protected interest if he can show the existence of a policy or custom and a sufficient causal link between the policy or custom and the

constitutional deprivation.” Based on *Daniels*, the proof of fault has to go beyond mere negligence, *Id* at 523. There is nothing in this case indicating a policy or custom on the part of the Wayne County Treasurer to take property without notice. There is nothing so indicating because there is no such policy or custom.¹

Persons who lose their property in a foreclosure action without notice are not without a remedy. MCL 211.78l allows such persons to bring suit in the court of claims for the fair market value of the property lost. The foreclosing governmental unit gets good and marketable fee simple title to the property.” MCL 211.78k(5)(d). The legislature clearly has the authority to create such an interest.² When the foreclosing governmental unit sells the foreclosed property it transfers “good and marketable fee simple title.” The person who in good faith purchased the marketable title cannot be deprived of it without compensation. Moreover, once the foreclosing unit no longer owns the property it cannot be ordered to return it, see *Rodgers v. Beckel*, 172 Mich 544, 548 (1912), *Kennedy v. Hazelton*, 128 U.S. 667, 671 (1888). Therefore, it is not a solution to simply try to put the property back into the hands of the person who owned it prior to foreclosure since to so do would unconstitutionally deprive another of a property right the legislature created.

The provisions of the Uniform Condemnation Procedures Act, Act 87 of 1980, is analogous to the Tax Act. Property owners private property may be taken with no other recourse than just compensation. Although real estate has been deemed unique, just compensation accounts for this. An interest holder, pursuant to the Tax Act, may seek monetary damages from the foreclosing governmental unit, asking for compensation which addresses the uniqueness of

¹ Even if there were such evidence it would pertain only to Wayne County and would not affect the constitutionality of MCL 211.78l as applied in other counties.

² “As we explained in *Board of Regents v. Roth*, 408 U.S. 564 (1972), property interests ‘are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.’ *Id.*” *Parratt v. Taylor*, 451 U.S. 527, fn. 1.

The provisions of the Uniform Condemnation Procedures Act, Act 87 of 1980, is analogous to the Tax Act. Property owners private property may be taken with no other recourse than just compensation. Although real estate has been deemed unique, just compensation accounts for this. An interest holder, pursuant to the Tax Act, may seek monetary damages from the foreclosing governmental unit, asking for compensation which addresses the uniqueness of the real estate involved. In essence, an interest holder that lost property without proper notice would be made whole by and through the Court of Claims, just like a property owner under the UCPA. One may argue that due process is a requirement under both Acts, but the point is that the only challenge a property owner has under the UCPA is regarding necessity. Assuming necessity is proven, a property owner has no choice as to keeping their property and is left with seeking monetary compensation. The recovery of property taxes and the placing of property back into productive use is most certainly a public use and necessary. The taking of private property under the General Property Tax Act is very similar to property taken under the UCPA in that if a property owner is not provided notice under the Tax Act, they are compensated through monetary damages, just as in the UCPA.

The Wayne County Treasurer did not have to become the foreclosing governmental unit. It could have let the state foreclose on its tax delinquent property. When it elected to foreclose it necessarily elected to subject itself to the costs of mistakes. There is a significant policy reason for counties to do their own foreclosures, viz., they, rather than state employees in Lansing, can control land use within their borders and thereby attempt to accomplish the goals of the Tax Act. But such a choice brings risks. The Wayne County Treasurer, having elected to try to manage its delinquent parcels, should not be allowed to escape the costs of its errors if such an escape deprives others of properly acquired rights and jeopardizes the entire purpose of the Tax Act.

Government and Urban Policy Committee, Mr. Jeffrey Reno, now a professor at the College of the Holy Cross, but then Research Director for the Institute's Lansing Operation and a key draftsman of the proposals that resulted in the Tax Act, stated:

“Michigan’s current tax reversion process is lengthy and complicated. It was intended to give property owners facing financial difficulties ample time to pay their taxes before losing their property. Instead it affords inadequate protection to property owners and often results in a title of questionable legal value. Furthermore, it permits unscrupulous individuals to exploit both families and the government. In short, it creates a circuit of blight, which undermines neighborhood stability and weakens Michigan’s neighborhoods.”

The legislature understood the economic and social problems caused by the prior system of foreclosure. The Tax Act was designed to remedy those problems. “The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.” MCL 211.78.

To accomplish the “expeditious return to productive use of property returned for delinquent taxes” several changes were necessary. Among the critical changes were that the foreclosure process was shortened to less than three years and “except as otherwise provided in subdivisions (c) and (e), the foreclosing governmental unit has good and marketable fee simple title to the property.” MCL 211.78k(5)(d).

According to Reno, when, in July 1999, Governor Engler signed the Act there was “an air of jubilation”. The Governor stated that “this legislation will bring the benefits of economic prosperity that much of Michigan has enjoyed the past several years to our urban areas and the

people who need it most.” Jeffrey Reno, A Floor Without a Ceiling: Ethics and Strategy in Policy Design, a paper prepared for presentation at the 2000 American Political Science Association Annual Meeting, http://college.holycross.edu/faculty/jreno/Floor_without_Ceiling.pdf, p. 1.

Governor Engler was correct. The Act has been a huge success. In Genesee County, for example, the treasurer, through the county land bank, now owns over 9% of the parcels in the city of Flint and has been able to demolish almost 600 foreclosed structures, contract for new infill housing in sustainable neighborhoods on several of the foreclosed lots and rehabilitate and resell several other houses obtained through the foreclosure process. Title insurance is now available and procured on houses sold by Genesee County. In short, the legislative goal was achieved. To now rule that an element crucial to the expeditious return of foreclosed property to productive use is unconstitutional would contradict precedent, thwart the legislative intent, deprive the Appellants here of a right created by the legislature, and reintroduce the cause of uncontrolled blight throughout many areas of the state.

RELIEF REQUESTED

Wherefore, in light of the foregoing, the Appellants respectfully requests that this Honorable Court enter an Order reversing the Circuit Court's Order Granting Relief from the Judgment of Foreclosure and Vacating of Sale by holding that the Circuit Court lacked jurisdiction pursuant to MCL 211.781 .

Respectfully submitted,

ALDRICH LEGAL SERVICES, PLLC



BRAD B. ALDRICH (P57220)

Attorney for Appellants

276 S. Union, Suite 1

Plymouth, Michigan 48170

(734) 404-3000

Dated: April 17, 2006